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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JONNET DEVELOPMENT CORPORATION AND ELMER J. JONNET, JR.,

Petitioners,

v.

RICHARD S. CALIGUIRI, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Respondents In Opposition To Petition

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QUESTION PRESENTED

Whether this Court should review the Third Circuit's summary affirmance of the award of counterclaim damages resulting from petitioner's fraud, forgery and perjury in the prosecution of this action where no constitutional or substantial federal questions are presented and the issues merely are factual in nature and were the subject of a previous unsuccessful petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

This is the second occasion on which Jonnet Development Corporation and Elmer J. Jonnet, Jr. (collectively "Jonnet" or "petitioner")[1] have petitioned this Court for a writ of certiorari in this action. The factual determinations of the district court which form the basis of the present petition were unsuccessfully challenged in Jonnet's previous appeal and petition. The statement of the case set forth in the petition, however, does not adequately address this fact and otherwise misstates or fails to state various critical factual and procedural matters. Respondents Consolidated Rail Corporation and its former chairman, Edward G. Jordan (collectively "Conrail"), believe these matters require denial of the petition and, accordingly, have summarized them as follows:

In addition to the present action, petitioner also filed several related actions in the Court of Common Pleas of Allegheny County, Pennsylvania against Conrail and certain other respondents. Petitioner's filing of this action and the companion state court actions placed a cloud on Con-

[1]Elmer J. Jonnet, Jr., the controlling officer and shareholder of Jonnet Development Corporation, was joined as a defendant on the counterclaim by Order dated August 10, 1982. (C.A. Supp. App. at 21) That joinder has not been challenged and, accordingly, no distinction is made herein between the two petitioners.

rail's title to the Pennsylvania Railroad Station property which prevented its transfer for redevelopment purposes to the Urban Redevelopment Authority of the City of Pittsburgh. (C.A. App. at 130a-131a)

Conrail defended against the equitable claims in this action by asserting that petitioner was acting in bad faith and in reliance upon a fraudulent sales agreement. At the commencement of the June 8, 1981 evidentiary hearing pursuant to Fed.R.Civ.P. 42(b) concerning the limited issue of the bad faith and fraud defenses of Conrail, petitioner moved to withdraw its request for equitable relief in an attempt to prevent or at least delay an adjudication of its fraudulent conduct. Despite several requests, petitioner refused to likewise withdraw its equitable claims in the related state court actions. This refusal necessarily would have had the effect of continuing the cloud on Conrail's title even in the event the equitable claims in the present federal action were withdrawn. Conrail and the other respondents refused to consent to the motion for withdrawal because of their belief that a finding by the district court of fraudulent conduct could be used (by operation of collateral estoppel) to obtain a dismissal of the state court actions and, thereby, clear Conrail's title. (C.A. App. at 106a; 113a-118a) In recognition of both the substantial prejudice that would be caused to the respondents if petitioner were permitted to delay a determination of its fraud and also the serious questions raised concerning petitioner's alleged affront to the integrity of the judicial process, the district court denied the motion to withdraw and ordered that the hearing proceed. (C.A. App. 128a-129a)

At the conclusion of the evidentiary hearing, the district court found by clear and convincing evidence that the purported sales agreement relied upon by petitioner in support of its equitable claims contained intentional and

fraudulent alterations and that petitioner had provided false testimony under oath in furtherance of that fraud. Because of petitioner's unclean hands and fraudulent conduct, the district court by Order dated June 16, 1981 denied all its claims for equitable relief. (C.A. App. at 130a-155a) Petitioner filed an appeal (No. 81-2182) from the district court's June 16, 1981 ruling to the United States Court of Appeals for the Third Circuit and argued, *as it does again now in its present petition*, that the district court abused its discretion in refusing to grant its last-minute request to withdraw the equitable claims. The Third Circuit denied the appeal and upheld the district court's actions and rejected petitioner's assertion that the ruling in question resulted in a non-jury determination of its fraudulent conduct in alleged violation of its right to a jury trial. (C.A. Supp. App. at 103-104) Petitioner then filed with this Court a petition for a writ of certiorari (No. 81-2274) which likewise challenged the district court's exercise of discretion in refusing to permit withdrawal of its equitable claims. That petition was denied by Order dated October 4, 1982. (C.A. Supp. App. at 105)

Proceedings then continued in the district court on the remaining issues of petitioner's antitrust claim for damages and Conrail's counterclaim for damages resulting from the wrongful and fraudulent prosecution of this action. By Order dated January 25, 1983, the district court granted Conrail's motion for summary judgment as to liability on its counterclaim and granted summary judgment in Conrail's favor with respect to petitioner's antitrust damage claim. (Pet. for Cert. at 33a-35a) Petitioner does not contest these summary judgment awards.

At an evidentiary hearing on February 7, 1983, Conrail proved its counterclaim damages by clear and convincing evidence. These damages were established by means of

facts stipulated to by the parties as well as verified testimony and evidence which petitioner did not attempt to contest or rebut. (C.A. Supp. App. at 22-28)

By Order dated February 14, 1983, the district court awarded Conrail its counterclaim damages which included, *as an element of damage and not as a matter of the court's discretion*, reimbursement of legal fees and expenses incurred in the defense of petitioner's equitable claims. (Pet. for Cert. at 22a-23a) The United States Court of Appeals for the Third Circuit granted summary affirmance by Order dated January 30, 1984 of that damage award to Conrail. (Pet. for Cert. at 1a-2a)[2] Jonnet's present petition seeks review of that summary affirmance.

ARGUMENT

THIS CASE PRESENTS NO CONSTITUTIONAL OR SUBSTANTIAL FEDERAL QUESTIONS APPROPRIATE FOR REVIEW AND MERELY RAISES FACTUAL MATTERS RELATING TO DAMAGES WHICH ARE FULLY SUPPORTED BY THE RECORD AND WERE THE SUBJECT OF A PREVIOUS UNSUCCESSFUL PETITION FOR A WRIT OF CERTIORARI.

The petition essentially requests that this Court review the record to determine whether sufficient factual

[2]The February 14, 1983 Order also awarded punitive damages to Conrail in the amount of $5,000 which certainly is reasonable in light of the egregiousness of Jonnet's fraudulent conduct and which Jonnet does not contest in its petition.

By separate Order dated February 15, 1983 (Pet. for Cert. at 11a-13a), the district court awarded attorneys' fees to certain of the other respondents but not to Conrail since Conrail had received reimbursement of those fees as an element of damage on its counterclaim. Accordingly, Jonnet's present challenge on the basis of the so-called "American Rule" to the February 15, 1983 award of attorneys' fees to certain respondents has no application whatsoever to the district court's February 14, 1983 Order reimbursing Conrail for certain legal fees and expenses.

support exists for certain rulings affecting damages which petitioner concedes were matters within the discretion and equitable powers of the district court. Petitioner does not claim that the district court impaired its constitutional rights, applied incorrect or even disputable legal standards, or otherwise took action raising substantial federal questions of general application which traditionally have been the subject matter deemed suitable for this Court's review. The present request that this Court second-guess the district court with respect to its fact determinations simply is inappropriate, especially since the same matters were involved in Jonnet's previous unsuccessful petition for a writ of certiorari.

Petitioner's primary argument is that there was insufficient factual support for the district court's exercise of its discretion in denying petitioner's last-minute motion to withdraw its claims for equitable relief. As described in detail in the counterstatement of the case, that denial was required to avoid undue prejudice to Conrail and the other respondents because of petitioner's repeated refusals to likewise dismiss its equitable claims in companion state court litigation. Permitting petitioner to avoid or delay an adjudication of its fraud by withdrawing its equitable claims on the eve of trial simply would have continued the cloud on Conrail's title to the Pennsylvania Railroad Station property.

The detriment and prejudice to the parties and the public resulting from further delay of the transfer and redevelopment of the property in question provided sufficient basis for the denial of petitioner's motion to withdraw. Indeed, the denial of the motion was compelled under the authority relied upon by petitioner, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and the controlling precedent of the Third Circuit, *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d

Cir. 1974), which establish that the bad faith of the moving party and the prejudice to the opposing party are the dispositive considerations in ruling upon such a motion. Moreover, the district court had the inherent power (despite the desires of any of the parties) to order that the evidentiary hearing proceed because petitioner's fraud in the prosecution of this action constituted an affront to the integrity of the court's own processes. *E.g., Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Gaudiosi v. Mellon*, 269 F.2d 873 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).

Even if there were any merit to its argument—which there is not—petitioner should not be permitted to again challenge the denial of the motion to withdraw as that ruling was the subject of Jonnet's previous unsuccessful appeal and petition to this Court. Petitioner then claimed that the district court's supposed abuse of discretion in denying the motion to withdraw resulted in a non-jury determination of the fraud issue which allegedly deprived petitioner of its constitutional right to jury trial. Although petitioner's previous challenge raised constitutional questions not involved in the present petition, its prior appeal was unsuccessful and its petition for a writ of certiorari was denied. Petitioner should not be entitled to renew its unsuccessful attack on the district court's denial of its motion to withdraw simply because it now chooses to characterize that same ruling as affecting the damages awarded rather than its jury trial rights as previously asserted. *Cf., Arizona v. California*, 103 S.Ct. 1382 (1983); *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 103 S.Ct. 58 (1982).

Petitioner's second argument that there is insufficient factual support for the district court's awarding of attorneys' fees to certain of the respondents likewise has no

merit. The district court expressly found by clear and convincing evidence at the conclusion of the hearing held in June of 1981 that petitioner was guilty of fraud, forgery, and perjury in the prosecution of its equitable claims. Those findings were upheld on petitioner's previous appeal with respect to which this Court refused to grant a writ of certiorari. The district court reaffirmed those matters in its February 14, 1983 Findings and Conclusions and expressly found that the "institution and prosecution of the equitable claim [by petitioner] was willful, vexatious, and in bad faith . . . [and was] solely designed to interfere with the prospective business opportunity of [Conrail]." (Pet. for Cert. at 20a-21a) Such express factual findings by the district court certainly justify the discretionary award of attorneys' fees to the respondents under the so-called "American Rule" standards cited by petitioner.

Even in the absence of such factual findings, however, the award of attorneys' fees to Conrail would be proper. The district court's award to Conrail by Order dated February 14, 1983 of reimbursement of certain attorneys' fees was done as an element of damage on the counterclaim and not as a matter of the district court's discretion. Petitioner does not contest that reimbursement of such fees is a proper element of damage on the counterclaim. The amount of counterclaim damages awarded to Conrail was established by means of uncontested or stipulated proof and, accordingly, even the amount of such damages cannot now be meaningfully challenged by petitioner.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Counsel for Respondents, Consolidated Rail Corporation and Edward G. Jordan

Dated: May 30, 1984

RULE 28.1 CERTIFICATE

Respondent Consolidated Rail Corporation advises the Court pursuant to Rule 28.1 that it has no parent company and that it owns stock in the following subsidiaries (except wholly-owned subsidiaries) or affiliates:

The Akron and Barberton Belt Railroad Company
Albany Port Railroad Company
The Belt Railway Company of Chicago
Calumet Western Railway Company
The Canada Southern Railway Company
Chicago and Western Indiana Railroad Company
Fruit Growers Express Company
Indiana Harbor Belt Railroad Company
The Lakefront Dock and Railroad
Terminal Company
The Monongahela Railway Company
The Niagara River Bridge Company
(a wholly-owned subsidiary of
The Canada Southern Railway Company)
Nicholas, Fayette and Greenbrier Railroad Company
Peoria and Pekin Union Railway Company
Pittsburgh, Chartiers Youghiogheny
Railway Company
Railbox Company
(a wholly-owned subsidiary of
Trailer Train Company)
Railgon Company
(a wholly-owned subsidiary of
Trailer Train Company)
Trailer Train Company
Trailer Train Finance N.V.
(a wholly-owned subsidiary of
Trailer Train Company)